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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ABANTE ROOTER AND PLUMBING,
INC., MARK HANKINS, and PHILIP J.
CHARVAT, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

ALARM.COM INCORPORATED, and
ALARM.COM HOLDINGS, INC.,

Defendants.

NO. 4:15-cv-06314-YGR

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT; NOTICE OF
CROSS-MOTION FOR PARTIAL
SUMMARY JUDGMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

JURY TRIAL DEMAND

Complaint Filed: December 30, 2015

Honorable Yvonne Gonzalez Rogers

DATE: July 24, 2018

TIME: 2:00 p.m.

LOCATION: Oakland Courthouse
Courtroom 1 - 4th Floor

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT; NOTICE OF CROSS-MOTION FOR PARTIAL SUMMARY
JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES
CASE No. 4:15-cv-06314-YGR

NOTICE OF MOTION

TO: THE CLERK OF THE COURT; and
TO: DEFENDANTS ALARM.COM INCORPORATED AND ALARM.COM HOLDINGS,
INC., AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 24, 2018, at 2:00 p.m., in Courtroom 1, 4th Floor, of the U.S. District Court for the Northern District of California, 1301 Clay Street, Oakland, California, 94612, Plaintiffs will move for cross-motion for partial summary judgment. This motion will be made on the grounds that no genuine issue of material fact exists as to whether the Ytel dialing system is an ATDS.

The motion will be based on: this Notice of Motion; the following Memorandum of Points and Authorities; the accompanying declaration of Beth E. Terrell and the attached exhibits, Plaintiffs' Response to Defendants' Separate Statement of Undisputed Facts; the records and file in this action; and such other matters as may be presented before or at the hearing of the motion.

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I. INTRODUCTION

The Ninth Circuit follows the FCC’s approach to vicarious liability under the TCPA. *Kristensen v. Credit Payment Servs. Inc.*, 879 F.3d 1010, 1014 (9th Cir. 2018). The FCC has determined that vicarious liability is essential to serve the TCPA’s remedial purpose of protecting Americans from “unwanted telephone invasions.” *In re Joint Petition filed by Dish Network, LLC*, 28 FCC Rcd. 6574, 6587 (2013). Vicarious liability is important because reputable, traceable, and solvent companies that benefit from illegal telemarketing “are in the best position to monitor and police TCPA compliance by third-party telemarketers,” and, unless the beneficiaries are held accountable, consumers would be left without recourse, relegated to futilely chasing down third-party telemarketers that are commonly “judgment proof, unidentifiable, or located outside the United States.” *Id.* at 6588.

The statute’s consumer protection goals are achieved by applying vicarious liability to cases like this one, where Alarm.com farmed out the dirty and legally risky work of telemarketing to known illegal telemarketers like Alliance/VMS that generated millions of dollars in sales. Alarm.com placed profit ahead of compliance. Alarm.com steadfastly refused to take action against Alliance/VMS despite actual knowledge of Alliance/VMS’s ongoing, systemic telemarketing violations. To this day, Alliance remains a valued and profitable source of Alarm.com subscriptions, generating new customers using illegal telemarketing.

Rather than confront all of the vicarious liability theories Plaintiffs allege—as discussed at length in their response to Alarm.com’s pre-summary judgment letter and at the subsequent hearing—Alarm.com has moved for summary judgment on **a theory Plaintiffs do not even assert**. Moreover, Alarm.com relies on the analysis of a case the Ninth Circuit recently clarified is limited “to actual authority and vicarious liability under an employer-employee theory”—a theory Plaintiffs have never asserted—and “the facts and arguments properly before the court.” *Jones v. Royal Admin. Servs., Inc.*, 887 F.3d 443, 449 n.3 (9th Cir. 2018). In outlining the ten-factor test for use in “determining whether a principal, who has hired third-party telemarketers,

1 exercises sufficient control to be held vicariously liable under the TCPA *to the same degree that*
 2 *an employer may be held liable for the actions of its employees*” the Court “express[ed] no
 3 opinion on the usefulness of these factors in establishing other common law theories for holding
 4 a principal liable for the conduct of its agent.” *Id.* at 451 n.4.

5 Plaintiffs allege that Alarm.com is vicariously liable for Alliance’s telemarketing
 6 violations based on three theories: (1) implied actual authority; (2) apparent authority; and
 7 (3) ratification. Alarm.com never mentions Plaintiffs’ implied actual authority theory. Having
 8 not moved on that theory, Alarm.com’s motion must be denied. Alarm.com’s reluctance to face
 9 this theory is not surprising, since the evidence confirms that it had the power to stop Alliance’s
 10 illegal telemarketing but failed to do so. Alarm.com has also not shown that it is entitled to
 11 judgment as a matter of law on Plaintiffs’ apparent authority theory. A reasonable jury could find
 12 that consumers believed Alarm.com authorized Alliance to place the unlawful calls based on
 13 manifestations that are “traceable” to Alarm.com. Nor has Alarm.com demonstrated an absence
 14 of material facts as to Plaintiffs’ ratification theory; to the contrary, the evidence shows that
 15 Alarm.com ratified unlawful calls by accepting the benefits of the calls in the form of millions of
 16 dollars in profit. And finally, the dialer used to place calls to cell phones in this case qualifies as
 17 an ATDS even after *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), and it is
 18 undisputed that Alliance’s agent, Nationwide, used the dialer to place calls to cell phones.
 19 Alarm.com’s motion should be denied and Plaintiffs granted summary judgment on this issue.

18 II. STATEMENT OF FACTS

19 A. Alarm.com sells alarm monitoring subscriptions through — not to — its dealers.

20 Alarm.com sells interactive, cloud-based security services and the hardware necessary for
 21 consumers to use those services through a network of “dealer partners” or “service providers,”
 22 such as Alliance. Alliance, which was formerly known as Versatile Marketing Solutions or
 23 VMS, [REDACTED]. Ex. 1 at ALARM-6-7; Ex. 2 at 54:2-6.¹

24 ¹ Unless otherwise indicated, all exhibits are to the Declaration of Beth E. Terrell.
 PLAINTIFFS’ RESPONSE TO DEFENDANTS’ MOTION FOR SUMMARY
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1 The Subscription Agreements that the customers sign prominently display the Alarm.com logo
 2 and the title “Alarm.com Terms,” state that Alarm.com has “authorized” Alliance to market and
 3 sell its services with certain hardware and other products, and provide that the “Alarm.com
 4 Terms” are part of any agreement that the customer has with the dealer. Ex. 3.

5 Alarm.com’s assertion that it “sells its software to approximately 6,000 authorized
 6 dealers” (Mtn at 4:8-9) is not true. Dealers like Alliance [REDACTED]

7 [REDACTED] Ex. 1 ¶ 3.1 (requiring Alliance
 8 [REDACTED]; Definitions (defining [REDACTED]
 9 [REDACTED]

10 [REDACTED] Alliance is not a party to the Subscription Agreements.

11 Once Alliance signs a customer up for an Alarm.com subscription, Alliance creates an
 12 account for the new subscriber using Alarm.com’s service provider portal. Ex. 4 at 55:9-22; Ex.5
 13 at 16671. Alliance then collects “monthly service charges” and “activation fees” from the end
 14 users and remits those payments to Alarm.com. Ex. 6 at 19:6-20:8. If Alliance’s Dealer
 Agreement with Alarm.com terminates, [REDACTED]

15 [REDACTED] Ex. 1.

16 **B. The Dealer Agreement gives Alarm.com the right to control Alliance.**

17 The Alarm.com Dealer Agreement (Ex. 1) imposes a host of requirements on Alliance. It
 18 requires Alliance [REDACTED]

19 [REDACTED] Id. ¶ 3.4. Alliance must [REDACTED]

20 [REDACTED] Id. ¶ 3.2. Alliance must [REDACTED]

21 [REDACTED] Id. Alliance must [REDACTED]
 22 [REDACTED]
 23 [REDACTED]

Id. ¶ 3.4. Alliance must

Id. ¶ 3.3. Alarm.com

Id. ¶ 5.2. Alarm.com

Id. ¶ 7.1. Alliance can

Id. at ¶ 3.3.

Alarm.com asserts that dealers choose “whether and how” to incorporate Alarm.com software into their “fully integrated security systems” and Alarm.com is “just one” of many hardware and software components. Mtn at 4:12–20. Not so. Until summer 2017, Alliance was required to exclusively sell Alarm.com products and services. Ex. 2 at 109:18-110:2. This requirement [REDACTED] Ex. 1 at Alarm-17; *see also* Ex. 7 at 163:2-20. As Alarm.com’s industry expert conceded, the only way Alliance could choose to use a service other than Alarm.com is if it terminated the Dealer Agreement. Ex. 8 at 55:15-56:13. The Agreement also requires [REDACTED] [REDACTED] Ex. 1 at Alarm-6.

Alarm.com suggests that Alliance was not promoting its services, but an account update sent to Alarm.com’s Vice-President of Sales noted that Alliance had “seen explosive growth because of their effort to incorporate us in to every sale.” Ex. 9. Although Alliance sold security systems with components manufactured by other entities (so long as the components were “Alarm.com Ready”), Alliance’s business cards had only two logos—Alarm.com and Alliance. Ex. 8 at Ex. 8. Alarm.com also required Alliance to include the slogan “powered by Alarm.com” on its website as a condition for receiving marketing funds. Ex. 8 at Ex. 7. And Mr. Kaufer admitted that Alliance promoted Alarm.com. Ex. 8 at 130:13-133:9.

It is also not true that Alliance sells Alarm.com services on its “own account.” Mtn at 4:19-20. The Dealer Agreement [REDACTED] *See* Ex. 1 at ALARM-14-15. Although Alliance must [REDACTED]

(see *id.* ¶ 6.1),

. Ex. 1 at ALARM-6. For example,

. *Id.* ¶ 11.6.

Alarm.com contends that the Dealer Agreement does not give it the ability to control or monitor Alliance’s marketing techniques and activities. Alarm.com’s customer lead service program, “CLS,” belies Alarm.com’s assertions. Alarm.com

. See Ex. 34

Ex. 4 at 151:16–152:9, 59:3–13

Even outside the CLS program, Alarm.com supported dealers, providing brochures, flyers, calling scripts, rebuttals, training, dedicated support staff, co-branded marketing collateral such as business cards, shirts, and hats, subscription and attrition reports, and funding. Ex. 4 at 11:18-12:2, 13:5-18, 51:2-10, 92:8–93:17 & 95:20-97:9, 98:14-111:7, 136:1-17; Ex. 10; Dkt. Nos. 196-2, 196-3, 196-4; Ex. 11; Ex. 8 at Ex. 8.

C. Alarm.com knew about the unlawful calls and had the ability to control Alliance’s calling, but steadfastly refused to reign Alliance in.

Alarm.com acknowledges that it had the ability to control Alliance’s illegal telemarketing practices. Outside of the CLS program, Alarm.com says that it does not “actively monitor or control the sales and marketing practices of our service providers.” Ex. 4 at 172:15-176:16. But Alarm.com admits it can take action to ensure compliance with telemarketing laws when it is “made aware of an egregious case.” *Id.* at 36:10-37:20.

Alarm.com knew about Alliance’s egregious telemarketing violations but did nothing to stop them. In late April or early May of 2012, the Today Show aired a segment about aggressive telemarketers repeatedly targeting consumers whose phone numbers were on the NDNC

Registry. See Ex. 12. The segment reported that VMS admitted to violations of Pennsylvania’s

1 telemarketing laws and paid \$28,000 to settle, and paid \$20,000 in penalties to the state of
 2 Kentucky for telemarketing violations. *Id.* at 4. The segment also reported that VMS had been
 3 sued in a class action lawsuit and, notwithstanding that lawsuit and the fact that the lead
 4 plaintiff's telephone number was on the NDNC registry, VMS continued to call the plaintiff. *Id.*

5 Alarm.com concedes it knew about the Today Show segment "soon after it aired." Mtn
 6 at 7:8-13. Alarm.com claims that it "investigated the matter further" and VMS "assured
 7 Alarm.com that safeguards were in place that would prevent any future violations." *Id.* But the
 8 email on which it relies states only that Alarm.com's Vice President of Sales, Nate Natale,
 9 "spoke to Jay" Gotra who told him that VMS had "a lot of safeguards in place to make sure this
 10 doesn't happen." Ex. 13. It is not clear from the email whether Mr. Gotra assured Mr. Natale that
 11 the safeguards were in place "to make sure this doesn't happen in the future" or whether the
 12 violations occurred despite the purported "safeguards." *Id.* The email suggests the violations
 13 occurred due to the large volume of sales VMS generated. *Id.* (Gotra represented that "[t]o
 14 generate as many sales as they do this was a minor problem with the software they were using").
 15 The only other "assurances" were VMS's commitment to continue selling a large volume of
 16 Alarm.com products and Monitronics' assurance that the segment "will not affect them." *Id.*

17 The email shows that, far from taking the segment seriously, Mr. Natale found the fact
 18 that the Today Show had featured Mr. Gotra's yellow Ferrari to be "kind of funny." *Id.* CEO
 19 Steve Trundle also minimized the segment, saying he tended "not to trust the mass market news
 20 media other than the [Wall Street Journal] too much because I have seen their reporting
 21 consistently be biased and sometimes slanderous." *Id.* Mr. Trundle testified that [REDACTED]

22 [REDACTED] Ex. 7 at 69:8-
 23 70:6. [REDACTED]
 24 [REDACTED] *Id.*
 at 70:5-12; Ex. 4 at 174:10-175:24.

[REDACTED] *Id.* at 70:22-72:4; Ex. 4 at 176:12-16.

1 Had Alarm.com conducted even the most cursory investigation, it would have learned
2 that VMS's allegedly "minor problem with its software" had been an ongoing problem; the
3 Pennsylvania AG fined VMS in 2010 and the telemarketing violations continued through 2011
4 when VMS was sued in a class action lawsuit in West Virginia and 2012 when the Kentucky AG
5 fined VMS once again. *See* Ex. 14; Ex. 15; Ex. 16. Alarm.com would have discovered that the
6 West Virginia court rejected Mr. Gotra's claim that VMS only called people who "opted in" to
7 receiving calls and granted summary judgment for the plaintiffs on VMS's "consent" defense.
8 *See* Ex. 17. Had Alarm.com monitored Alliance after the Today Show aired, it would have
9 learned that Alliance continued to place calls to telephone numbers on the NDNC Registry and
10 continued to get sued. Exs. 18 and 19; Ex. 30.

11 Citing a document that VMS provided to the FTC in response to a Civil Investigative
12 Demand issued weeks after the Today Show aired, Alarm.com notes that VMS made the same
13 representations to the FTC. *See* Mtn at 7 (citing Dkt. No. 196-13). But unlike Alarm.com, the
14 FTC did not take VMS's "assurances" at face value. Instead, the FTC conducted an extensive
15 investigation that culminated in a Stipulated Final Order for Permanent Injunction and Civil
16 Penalty Judgment in the amount of \$3.4 million. *See* Ex. 20.

17 Over the next several years, Alliance's telemarketing practices raised additional red flags.
18 During audits associated with the CLS program, Alarm.com named Alliance a "problem dealer"
19 due to its telemarketing practices, including overcalling, using an automated dialing system to
20 make calls, and leaving prerecorded messages. Ex. 4 at 59:3–61:10, 147:5–17. Alarm.com did
21 not inform Alliance of the audits results. Ex. 2 at 107:19-108:1.

22 Even after it was sued in 2015, Alarm.com did not discuss with Alliance whether it
23 complied with the TCPA. Ex. 21 at 26:6-14 (Alarm.com "typically do[es] not police or get
24 involved in a dealer's business or investigate their telemarketing practices or otherwise"). And
the calls continued. Mr. Charvat received a call from Alliance promoting Alarm.com's services
on November 14, 2017—nearly two years after he sued Alarm.com. Ex. 22. Alliance was sued

1 again just two months ago by the FTC, which characterized Alliance and Gotra as “recidivist
2 violators” of the telemarketing laws. Complaint ¶ 2, *FTC v. Alliance Security, Inc.*, No. 1:18-cv-
3 10548 (D. Mass. Mar. 22, 2018).

4 Alarm.com’s expert admitted that a company in the alarm industry “perhaps should exert
5 control over a dealer if it was aware there were [telemarketing] problems.” Ex. 8 at 99:8-102:6.
6 Mr. Kaufer said Alarm.com “could check, they could investigate, they could determine what was
7 happening, and they could potentially place limitations on Alliance going forward.” *Id.* at
8 101:18-24. It could also “choose to invoke paragraph 7.1 of the agreement to terminate Alliance
9 for violating the law.” *Id.* at 102:2-6. Alarm.com’s second industry expert, Joseph Colosimo,
10 testified that if he worked with a company subject to an injunction prohibiting TCPA violations
11 and was informed that the telemarketer may still be engaging in the prohibited conduct, he would
12 investigate. *See* Ex. 23 at 42:24-44:6. Plaintiffs’ expert testified that Alarm.com could have “sent
13 [Alliance] a letter, get proof of what they’re doing, do an investigation and to the extent they
14 weren’t satisfied or to the extent based on the egregious nature of what Alliance did, they could
15 have given them notice and turned those radios off immediately”—the effect of which is that the
16 customer “has no monitoring.” Ex. 24 at 120:1-121:16.

17 The Electronic Security Association’s “Code of Ethics” requires members to “comply
18 with all applicable laws that prohibit or regulate solicitations, including honoring all applicable
19 do-not-call lists and all other requests not to be called.” *Id.* at 122:18–123:19; *see also* Ex. 24 at
20 Ex. 7. ESA members must train employees and representatives who market security products on
21 their behalf, “to implement appropriate and effective controls to ensure compliance with the
22 Code.” Ex. 24 at 121:17-122:17. Alarm.com’s expert, Mr. Colosimo, testified that “dealers tend
23 to be a little bit unethical in the way they go to market, misrepresentation of who they work for,
24 why they’re there. So the industry in trying to control the problems that w[ere] going on in the
industry decided to write a Code of Ethics for ethical alarm companies to follow to try to control
the problem with dealer networks out there.” Ex. 23 at 19:14-20:7.

1 Mr. Colosimo opined that the Code did not bind Alarm.com because it is an “associate
 2 member” of the ESA. Ex. 25. Mr. Zwirn contacted the ESA and confirmed that the Code applies
 3 to **all** members, including associate members. Ex. 26. Mr. Colosimo insisted that the Code did
 4 not apply to Alarm.com because Alarm.com is a manufacturer that does not have a contractual
 5 relationship with the end user. Ex. 23 at 22:2-23:24. But the Subscription Agreements are
 6 between Alarm.com and end users. Mr. Colosimo also did not know that Alarm.com dictates the
 7 terms of the Subscription Agreements. *Id.* at 25:6-26:4 (“Q. But you don’t know if Alarm.com
 8 required Alliance to offer its service only under certain terms? A. I don’t know. I don’t know.”).
 9 Mr. Kaufer admitted that Alarm.com is a member of the ESA bound by the Code. Ex. 8 at 88:7-
 10 16. He testified that he believed Alarm.com abided by the Code, but conceded that “if
 11 Alarm.com became aware that one of its dealers was engaging in conduct that violated the Do
 Not Call registry” that conduct “might be” covered by the Code. *Id.* at 89:1-9.

12 **D. Alliance and Nationwide placed millions of unlawful calls between 2012 and 2016.**

13 After the Today Show aired in April 2012, Alliance and its representatives placed
 14 3,002,373 calls to 393,762 unique residential telephone numbers after those telephone numbers
 15 were listed on the NDNC Registry for at least 31 days and calls were placed to each number at
 16 least twice within a twelve-month period. Dkt. No. 99-1 at ¶ 34. Alliance’s agent, Nationwide,
 17 which was owned by a former Alliance employee, used a predictive dialer called Ytel to place to
 18 place 119,484 calls to 22,055 unique cell phone numbers. Dkt. No. 196-20 ¶ 57; Ex. 27 at 17:5-
 19 18:9, 18:17-19, 19:15-20:1. The Ytel dialing system has the inherent capacity to store telephone
 20 numbers to be dialed and then dial them automatically. Ex. 28. When used in “automatic” mode,
 the system beeps so call center employees know when to pick up the call. Ex. 28, Ex. A at 22:4-
 13. Nationwide placed 30,812 calls in “AUTO mode” to 15751 cell phones. Ex. 28 ¶ 12.

21 **E. Alarm.com benefitted from the unlawful telemarketing.**

22 Instead of taking steps to ensure that it would no longer receive leads from Alliance’s
 23 potentially illegal telemarketing, Alarm.com reaped the benefits of Alliance’s sales. Alarm.com

considered Alliance a “platinum partner,” which means that Alliance generated a minimum of 5,200 accounts annually. Ex. 4 at 108:2-19. In 2013, Alliance activated 6,759 new subscribers. Ex. 9. Between January and July 2014, Alliance generated 12,760 new accounts. *Id.* Alliance’s growth continued in 2015. Ex. 29. Alarm.com charged between \$4.50 and \$9.95 per month for each plan, (Ex. 6 at Ex. 31), and thus realized hundreds of thousands of dollars in recurring revenue from Alliance’s sales each year. Alliance also purchased hardware to support the systems from Alarm.com. Ex. 6 at 22:15-25:19 & Ex. 6 at Ex. 31 at 21 (Alarm.com received over \$1 million in revenue from Alliance between 2012 and 2015).

III. STATEMENT OF ISSUES

1. Should Alarm.com’s motion for summary judgment be denied because Alliance did not address Plaintiffs’ implied actual authority theory and instead moved for judgment of a theory of actual agency that Plaintiffs do not assert and issues of fact exist on Plaintiffs’ theory?

2. Should Alarm.com’s motion for summary judgment be denied because genuine issues of material fact exist as to whether Alarm.com can be held vicariously liable for Alliance’s calls on theories of apparent authority, and ratification?

3. Should Alarm.com’s motion for summary judgment on Plaintiffs’ cell phone claim be denied because the Ytel dialer is an ATDS (and Plaintiffs’ motion granted)?

IV. AUTHORITY AND ARGUMENT

A. Issues of fact exist as to whether Alarm.com can be held vicariously liable.

The FCC’s 2013 ruling in *Dish Network* governs vicarious liability under the TCPA. *Kristensen v. Credit Payment Servs.*, 879 F.3d 1010, 1014 (9th Cir. 2018). In *Dish*, the FCC explained that companies that can stop TCPA violations but fail to do so may be vicariously liable for those violations because “the seller is in the best position to monitor and police TCPA compliance by third-party telemarketers[.]” 28 F.C.C. Rcd. at 6588. Seller liability is “consistent with the statute’s consumer protection goals” because it “give[s] the seller appropriate incentives to ensure that their telemarketers comply with [the FCC’s] rules.” *Id.* If a seller is allowed “to

1 avoid potential liability by outsourcing its telemarketing activities to unsupervised third parties,”
2 consumers would be left “in many cases without an effective remedy for telemarketing
3 intrusions” particularly “if the telemarketers were judgment proof, unidentifiable, or located
4 outside the United States, as is often the case.” *Id.*

5 Vicarious liability is not limited “to circumstances in which formal agency exists and the
6 principal exerts immediate direction and control.” *Id.* at 6587 n.107; *accord Jones v. Royal*
7 *Admin. Servs., Inc.*, 887 F.3d 443, 448-449 (9th Cir. 2018) (noting that multiple theories of
8 agency liability exist). Consistent with the goal of ensuring that companies do not hire
9 telemarketers and then leave them unsupervised to rampantly violate the TCPA, companies may
10 be held vicariously liable for TCPA violations under the following theories: (1) actual or
11 “classical” agency; (2) apparent authority; and (3) ratification. *Dish*, 28 F.C.C. Rcd. at 6586-87.

12 1. Plaintiffs do not allege actual authority under an employer-employee theory.

13 Alarm.com contends that Plaintiffs cannot prove that it is liable for Alliance’s
14 telemarketing violations on an actual or “classical” agency theory but focuses its motion on a
15 theory Plaintiffs do not assert. As Plaintiffs informed Alarm.com in their response to its letter
16 requesting a summary judgment motion pre-filing conference, they allege an implied actual
17 authority theory based on Alarm.com’s power to stop Alliance’s illegal telemarketing but failure
18 to do so. Ex. 37. Plaintiffs explained their theory again at the April 6 hearing. Alarm.com omits
19 any reference to implied actual authority in its motion, which must therefore be denied.

20 Alarm.com instead focuses on the ten-factor test the Ninth Circuit outlined in *Jones* for
21 determining whether a defendant “can be held vicariously liable to the same degree that an
22 employer may be held liable for the acts of its employees.” 887 F.3d at 449. Two days before the
23 summary judgment motion pre-filing conference, the Ninth Circuit amended *Jones* to clarify that
24 it is “limited to the facts and arguments properly before the court,” *id.* at 449 n.3, and the ten-
factor test was “limited to the issue before the court,” which was “whether a principal, who has
hired third-party telemarketers, exercises sufficient control to be held vicariously liable under the

1 TCPA to the same degree that an employer may be held liable for the actions of its employees.”
2 *Id.* at 451 n.4. The Court explained that “in limiting our analysis to actual authority and vicarious
3 liability under an employer-employee theory we are not foreclosing the application of other
4 principles from the common law of agency.” *Id.* at 449 n.3 (citing *Dish*, 28 FCC Rcd. at 6584).
5 The Court “express[ed] no opinion on the usefulness” of the ten-factor test” in establishing other
6 common law theories for holding a principal liable for the conduct of its agent.” *Id.* at 451 n.4.

7 It is not surprising that the Ninth Circuit *sua sponte* amended *Jones* to clarify the narrow
8 scope of its holding, since the ten-factor test it applied is inconsistent with its other decisions
9 (and other courts’ decisions) addressing vicarious liability under the TCPA, as well as the FCC’s
10 *Dish* order. *See, e.g., Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 878-79 (9th Cir. 2014)
11 (deferring to the FCC’s interpretation of vicarious liability in *Dish*), *aff’d*, 136 S. Ct. 663 (2016).
12 Tacitly acknowledging the narrowness of the *Jones* holding, Alarm.com claims the Ninth Circuit
13 applied principles that other courts have used to determine whether a defendant had sufficient
14 control over a telemarketer to be vicariously liable. But none of the cases Alarm.com cites
15 supports its contention that the *Jones* test has any relevance to this case, where Plaintiffs’ implied
16 actual authority theory does not turn on the same indicia of control as an employer-employee
17 relationship. In *Meeks v. Buffalo Wild Wings, Inc.*, the plaintiff alleged that defendant Yelp’s co-
18 defendant had the ability to control a restaurant’s texts but did not allege (like Plaintiffs in this
19 case) that Yelp impliedly authorized unlawful texts because it knew about unlawful conduct and
20 acquiesced to it, No. 17-cv-07129-YGR, 2018 WL 1524067, at *6 (N.D. Cal. Mar. 28, 2018). In
21 *Thomas v. Taco Bell Corp.*, the plaintiff sought to hold the parent of an entity that conducted a
22 single text message campaign vicariously liable but did not allege the parent corporation was
23 aware of ongoing TCPA violations (and presumably could not because there was only a single
24 campaign). 879 F. Supp. 2d 1079 (C.D. Cal. 2012), *aff’d*, 879 F. App’x 678 (9th Cir. 2014).
Alarm.com also cites two cases arising out of telemarketing of alarm systems that involved
different facts. In *Makaron v. GE Security Manufacturing, Inc.*, the only evidence of agency was

1 the telemarketer's limited license to use the manufacturer's trademarks. No. CV-14-1274-GW
 2 (AGRx), 2015 WL 3526253, at *6 (C.D. Cal. May 18, 2015). And in *In re Monitronics*, the
 3 telemarketers did not sign consumers up for long-term contracts with the manufacturers, and the
 4 manufacturers repudiated the telemarketers' TCPA violations upon learning of them. 223 F.
 5 Supp. 3d 514, 520 (N.D. W. Va. 2016), *aff'd sub nom Hodgin v. UTC Fire & Sec. Ams. Corp.*,
 6 885 F.3d 243, 252 (4th Cir. 2018).

7 Not only does *Jones* not apply because its analysis is limited to a narrow theory not at
 8 issue in this case, the case is also factually distinguishable. The telemarketer in *Jones* sold
 9 extended automobile warranties for multiple companies, including the defendant's competitors.
 10 887 F.3d at 446. During the calls, the telemarketer would first sell the "concept" of the warranty
 11 and then pick a service plan to sell. *Id.* The Ninth Circuit found this fact significant, citing it in
 12 assessing three of the ten factors. *See id.* at 451-53. Alarm.com contends that Alliance is like the
 13 telemarketer in *Jones* because it sold security systems made up of multiple components and thus
 14 operated as an independent contractor for many different companies. But Alliance did not sell
 15 any products or services that **competed** with Alarm.com's. It sold Alarm.com's services
 16 [REDACTED] Ex. 2 at 109:18-110:2; Ex. 1 at
 17 Alarm-17; Ex. 7 at 163:2-20; Ex. 8 at 55:15-56:13; Ex. 9.

18 2. A reasonable jury could find Alarm.com liable under a classical agency theory.

19 Alarm.com fails to address Plaintiffs' classical agency theory, which alleges that Alliance
 20 had "implied actual authority" to place the calls due to Alarm.com's acquiescence.² This theory
 21 first requires a finding of an agency relationship. "Agency is the fiduciary relationship that arises
 22 when one person (a 'principal') manifests assent to another person (an 'agent') that the agent
 23 shall act on the principal's behalf and subject to the principal's control, and the agent manifests
 24 assent or otherwise consents so to act." *Mavrix Photographs, LLC v. LiveJournal, Inc.*, 873 F.3d

² Plaintiffs summarize the law and facts supporting Alarm.com liability under this theory even though the Court should not consider any new argument and evidence that Alarm.com may proffer on this theory in its reply. *See Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996).

1 1045, 1054 (9th Cir. 2017) (quoting Restatement (Third) of Agency § 1.01). The principal must
 2 have the “right to control” the actions of the agent. Restatement § 1.01, cmt c.

3 Alarm.com does not really challenge the fact that Alliance and Alarm.com had an agency
 4 relationship, nor could it. The Dealer Agreement expressly requires Alliance

5 [REDACTED] Ex. 1 ¶ 3.1

6 [REDACTED] ¶ 3.2

7 [REDACTED]
 8 [REDACTED] ¶ 3.3

9 [REDACTED] By permitting Alliance to

10 [REDACTED], Alarm.com has assented that Alliance act on its
 11 behalf. *See* Restatement § 1.01, cmt g, illus. 11 (a company that negotiates and enters into
 12 contracts between a principal corporation and third parties acts on behalf of the principal
 13 corporation and thus is an agent in connection with those contracts). Indeed, the Dealer
 Agreement requires Alliance

14 [REDACTED]
 15 [REDACTED] Ex. 1 ¶ 3.4.

16 Alarm.com was also able to control Alliance’s telemarketing if it chose to do so. The
 17 Dealer Agreement [REDACTED]
 18 [REDACTED] Ex. 1 ¶¶ 5.2, 7.1. Alarm.com also admits that it can
 19 take action to ensure compliance with telemarketing laws when it is “made aware of an
 20 egregious case.” Ex. 4 at 36:10-37:20. Alarm.com’s industry experts confirm that Alarm.com
 21 had authority to discipline or terminate Alliance for telemarketing violations. Ex. 8 at 99:8-
 102:6; Ex. 23 at 42:24-44:6.

22 Although the Dealer Agreement says [REDACTED]
 23 [REDACTED]

1 Restatement § 1.01, cmt. c. Regardless of a contract's language, the cornerstone of agency is
 2 whether the agent "enter[s] into transactions on the principal's account." *Id.* Alliance did exactly
 3 that when it [REDACTED]
 4 [REDACTED]. Ex.
 5 1 ¶ 6.1. This evidence is sufficient to create an issue for fact for the jury. *See Krakauer v. Dish*
 6 *Networks L.L.C.*, 1:14:-CV-333, 2017 WL 2455095, at *3 (M.D.N.C. June 6, 2017) (affirming
 7 jury verdict that telemarketer was an agent despite evidence that the contract and the parties
 8 considered the telemarketer to be an independent contractor).

9 Alarm.com points to language in the Dealer Agreement that says Alliance is [REDACTED]
 10 [REDACTED]. Ex. 1 ¶ 3.2(a)-(b). This provision [REDACTED]
 11 [REDACTED]
 12 [REDACTED]. *Id.* ¶ 3.3. The requirement that Alliance [REDACTED]
 13 [REDACTED] is like an indemnification provision allocating legal liability to Alliance for claims
 14 arising out of its sales activity—a provision that sellers like Alarm.com use to protect their
 15 interests. *See Dish*, 28 FCC Rcd. at 6591.

16 When an agency relationship exists, the next step is to determine whether the agent is
 17 acting within the scope of its authority, which may be implied by conduct and proven
 18 circumstantially. Restatement § 2.02 cmt. c. "While express actual authority is proven through
 19 words, implied actual authority is established through circumstantial evidence." *Id.* "A principal
 20 grants implied actual authority to an agent when the principal's reasonably interpreted words or
 21 conduct would cause an agent to believe that the principal consents to have an act done on her
 22 behalf." *Aranda v. Caribbean Cruise Line, Inc.*, 179 F. Supp. 3d 817, 831 (N.D. Ill. 2016); *see*
 23 *also* Dkt. No. 88 at Ex. 2 (Final Jury Instructions at 5-6, *Krakauer v. Dish Network L.L.C.*, No.
 24 1:14-cv-00333-CCE-JEP (N.D. W.Va. Jan. 19, 2017), ECF No. 293). "In determining whether
 an agent's action reflected a reasonable understanding of the principal's manifestations of

1 consent, it is relevant whether the principal knew of prior similar actions by the agent and
2 acquiesced in them.” Restatement § 2.02, cmt. e. The FCC held in *Dish* that a principal can be
3 vicariously liable “for the unauthorized conduct of a third-party telemarketer that is otherwise
4 authorized to market on the seller’s behalf and the seller failed to take effective steps within its
5 power to force the telemarketer to cease that conduct.” 28 FCC Rcd. at 6592 & n.138.

6 Substantial evidence shows that Alarm.com knew about Alliance’s pattern of unlawful
7 telemarketing but did nothing to stop it. CEO Steve Trundle admitted [REDACTED]

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
[REDACTED] Ex. 7 at 69:8-70:6. Alarm.com’s only response

12 *Id.* These statements were directly
13 contradicted by the Today Show segment, which reported that Alliance had been subject to
14 multiple enforcement actions over the years. Ex. 13. Alarm.com [REDACTED]

15 [REDACTED] Ex. 7 at 69:8-70:6; Ex. 4 at 172:15-176:16. It was not
16 reasonable for Alarm.com to rely on Mr. Gotra’s “assurances.” Alarm.com’s own expert
17 admitted that Alarm.com had the power to reign in Alliance and probably should have done so.
18 Ex. 8 at 75:15-76:21, 99:8-102:6. Plaintiffs’ expert agrees. Ex. 24 at 120:1-121:16.

19 There can be no dispute that Alarm.com should have known that Alliance continued to
20 violate the TCPA. *See Dish*, 28 FCC Rcd. at 6592 (extending vicarious liability to principals who
21 “reasonably should have known” that the telemarketer was violating the TCPA on their behalf);
22 Restatement § 1.04(4) (a person has notice of a fact if she “knows the fact, has reason to know
23 the fact, has received an effective notification of the fact, or should know the fact to fulfill a duty
24 owed to another person”). Had Alarm.com investigated or monitored Alliance’s conduct, it
would have learned about Alliance’s ongoing unlawful telemarketing. A simple docket search

1 reveals over 50 lawsuits filed against Alliance alleging telemarketing violations since 2014,
2 including cases consolidated in the Monitronics MDL. Ex. 30. Despite these red flags,
3 Alarm.com [REDACTED] Ex. 7 at
4 69:8-70:6; Ex. 4 at 172:15-176:16. Alarm.com did the opposite, negotiating an exclusive contract
5 in March 2015 that provided Alliance with preferential pricing and sales incentives. Ex. 31.

6 A jury can conclude from Alarm.com's acquiescence to Alliance's conduct that Alliance
7 reasonably believed Alarm.com consented to the tactics it was using to sell Alarm.com's
8 services, even tactics involving unlawful telemarketing calls, and reasonably believed that its
9 tactics were in Alarm.com's best interest because they resulted in sales. This evidence is
10 sufficient to defeat summary judgment. *See Krakauer*, 2017 WL 2455095, at *3 (M.D.N.C. June
11 6, 2017) (finding similar evidence supported jury's verdict that agent's telemarketing violations
were in the scope of its authority).

12 Without any citation to the record, Alarm.com asserts that it is "simply implausible" that
13 it has the resources and manpower to oversee and control its 6,000 dealers. Mtn at 15:19-22.
14 Even if relevant, this assertion is disputed. Alarm.com's industry experts, who were retained to
15 provide support on this very point, conceded that once Alarm.com learned about Alliance's
16 pattern of unlawful conduct, Alarm.com could have and should have investigated and exerted its
17 control over Alliance to prevent further telemarketing violations. Ex. 8 at 99:8-102:6; Ex. 23 at
42:24-44:6; *see also* Ex. 24 at 120:1-121:16.

18 3. A jury could find Alarm.com liable under an apparent authority theory.

19 Apparent authority turns on whether a third party believes the principal authorized its
20 agent to act and the belief is "traceable" to a manifestation of the principal. Restatement § 2.03,
21 cmt. c. "Apparent authority can arise in multiple ways, and does not require that a principal's
22 manifestation must be directed to a specific third party in a communication made directly to that
23 person." *Dish*, 28 FCC Rcd. at 6586 & n. 102 (citing Restatement § 2.03, cmt. c). A principal
may make a manifestation "by directing an agent to make statements to third parties or directing

1 or designating an agent to perform acts or conduct negotiations, placing an agent in a position
2 within an organization, or placing an agent in charge of a transaction or situation.” *Id.*

3 In *Dish*, the FCC stated that apparent authority may be supported by evidence that (1) the
4 seller allows the outside sales entity access to information and systems that normally would be
5 within the seller’s exclusive control; (2) the outside sales entity’s ability to enter consumer
6 information into the seller’s sales or customer systems; (3) the authority to use the seller’s trade
7 name, trademark and service mark; and (4) the seller approved, wrote or reviewed the outside
8 entity’s telemarketing scripts. 28 FCC Rcd. at 6592. These factors are satisfied. Alliance had
9 access to Alarm.com’s computer systems through a “dealer portal” and was required to enter
10 information about every subscriber into Alarm.com’s computer system. Ex. 4 at 55:9-22; Ex. 5 at
11 16671. Alarm.com [REDACTED]

[REDACTED]. Ex. 1 ¶ 3.2(d). Alarm.com provided Alliance with pre-approved scripts, which
12 included using the Alarm.com name. Ex. 4 at 95:20-97:9. Alliance was prohibited [REDACTED]

13 [REDACTED]. *Id.* ¶ 3.3. Apparent authority exists in this case. *See Mey v. Venture Data*, 245 F.
14 Supp. 3d 771, 789 (N.D. W. Va. 2017) (denying summary judgment where the evidence was
15 consistent with the “Dish Network factors”).

16 Alarm.com does not address the *Dish* factors, arguing instead that it is not enough for a
17 supplier to makes its products available through dealers. This case is nothing like a typical
18 supplier/dealer relationship. Alarm.com gave Alliance the authority to enter into contracts on its
19 behalf and then told potential customers on its website that they could purchase Alarm.com
20 goods and services through Alliance. These facts distinguish this case from *Makaron* and
21 *Monitronics*, which involved a telemarketing dealer that purchased supplies through a dealership
22 and resold them to customers. *Abante Rooter & Plumbing v. Farmers Grp., Inc.*, No. 17-cv-
23 03315-PJH, 2018 WL 288055, at *5-6 (Jan. 4, 2018), is also inapposite, since the Dealer
24 Agreement expressly authorizes Alliance [REDACTED]

1 [REDACTED] Ex. 1 ¶ 3.3.

2 Under the Restatement, apparent authority “does not presuppose the present or prior
3 existence of an agency relationship as defined in § 1.10.” Restatement § 2.03, cmt. a. “Apparent
4 authority is the power held by an agent **or other actor** to affect a principal’s legal relations with
5 third parties when a third party reasonably believes the actor has authority to act on behalf of the
6 principal and that belief is traceable to the principal’s manifestations.” *Id.* (emphasis added).
7 Thus, the disclaimer that Alarm.com includes in its Subscription Agreement is not dispositive,
8 particularly since the Subscription Agreement prominently displays the Alarm.com logo and the
9 title “Alarm.com Terms,” states that Alarm.com has “authorized” Alliance to market and sell its
10 services with certain hardware and other products, and provides that the “Alarm.com Terms” are
11 part of any agreement that the customer has with the dealer. Ex. 3. Based on these manifestations
12 directly attributable to Alarm.com, a reasonable consumer could assume that Alliance “has
13 authority to act on behalf of” Alarm.com. Restatement § 2.03.

14 4. A jury could find Alarm.com ratified Alliance’s unlawful telemarketing.

15 A company ratifies a telemarketer’s TCPA violations if it “knowingly accepts the
16 benefits of the transaction.” Restatement § 4.01, cmt. d. Ratification typically applies to an entity
17 that accepts benefits knowing the material facts, but also applies when a company accepts the
18 benefits of a transaction despite knowing that it does not have all material facts. *Kristensen*, 879
19 F.3d at 1014. In other words, an entity may not evade liability by burying its head in the sand to
20 avoid learning relevant facts. *See In re Nigeria Charter Flights Contract Litig.*, 520 F. Supp. 2d
21 447, 467 (E.D.N.Y. 2007) (“having once ratified its agents’ acts, [a principal] cannot afterwards
22 avoid the effect of such ratification by showing that it was not acquainted with all the facts of the
23 transaction ratified, when it was always in a position and was in possession of means of learning
24 them”). If a principal “has knowledge of facts that would have led a reasonable person to
investigate further, but the principal ratified without further investigation,” the principal has
“assumed the risk of liability” and is vicariously liable. *Kristensen*, 879 F.3d at 1014.

1 Ratification in the TCPA context “may occur ‘through conduct justifiable only on the
2 assumption that the person consents to be bound by the act’s legal consequences.’” *Dish*, 28 FCC
3 Rcd. at 6587. As just one example, the FCC explained that a company may be bound by even
4 unauthorized conduct of a telemarketer if the company “is aware of ongoing conduct
5 encompassing numerous acts by [the telemarketer]” and yet “fail[s] to terminate,” or, in some
6 circumstances, “promot[es] or celebrat[es]” the telemarketer. *Id.* at 6587 n.104.

7 It is not true, as Alarm.com asserts, that an agency relationship is a “precondition” for
8 ratification. Ratification applies when an actor “acts as an agent or **purports to be one.**”
9 *Kristensen*, 879 F.3d at 1014 (emphasis added). Alarm.com argues that the unlawful conduct
10 disclosed in the Today Show segment does not show that Alarm.com had knowledge of the calls
11 at issue in this case. But that is not the test. The segment alerted Alarm.com to a pattern of
12 conduct that had been ongoing for several years. This is precisely the type of “red flag” that
13 triggers a duty to investigate to determine whether the telemarketer was engaging in unlawful
14 activities. *See id.* at 1015 (distinguishing knowledge that an agent is engaging in “an otherwise
15 commonplace marketing activity” from knowledge of “unlawful conduct”).

16 Alarm.com’s own experts testified that it was not reasonable for Alarm.com to turn a
17 blind eye to telemarketing violations. Ex. 8 at 99:8-102:6; Ex. 23 at 42:24-44:6. The ESA Code
18 of Ethics confirms that Alarm.com’s conduct was unreasonable, as it requires ESA’s members,
19 including Alarm.com, to train their representatives and implement effective controls to ensure
20 that they comply with the law. Ex. 24 at Ex. 7. Had Alarm.com thoroughly investigated
21 Alliance’s conduct in 2012 when the Today Show aired, it could have prevented the calls at issue
22 in this case. As the Fourth Circuit points out in *Hodgin*, this is exactly what UTC did by
23 terminating its agreement with Alliance after its efforts to stop the unlawful calls were
24 unsuccessful. 885 F.3d at 252-53 (evidence that UTC “repudiated” the unlawful calls was
unrebutted). The FTC also did not rely on Mr. Gotra’s “assurances,” issuing Alliance a civil
investigative demand on June 2012 that resulted in a \$3.4 million fine in 2014. Ex. 20.

Alarm.com contends that Plaintiffs “have developed zero evidence” that it knew Mr. Gotra had not kept the promises he made in 2012. Mtn. at 20:14-18. Not so. In early 2014, Alarm.com named Alliance a “problem dealer” due to its telemarketing practices. Ex. 4 at 59:3–61:10, 147:5–17. In June 2014, Alarm.com’s VP of Sales forwarded Alliance an article on TCPA compliance that “reminded” him of Alliance. Ex. 32. Alarm.com suggests that it changed its practices after it was sued in December 2015, but its VP of Sales gave the party line when asked if Alarm.com asked Alliance if it was complying with telemarketing laws after this lawsuit was filed: “We typically do not police or get involved in a dealer’s business or investigate their telemarketing practices or otherwise.” Ex. 21 at 26:6-14.

Alarm.com [REDACTED] Ex. 7 at 71:3-12; Ex. 4 at 177:21-178:14. Alarm.com instead [REDACTED] Ex. 31. A reasonable jury could find that Alarm.com “assumed the risk of liability” by failing to investigate, monitor, and control Alliance’s unlawful telemarketing practices after being put on alert in 2012. Indeed, the FCC found just such a situation warranted imposing liability. *Dish*, 28 FCC Rcd. at n. 104.

Alarm.com also wrongly maintains that there is no evidence that it benefitted from the unlawful calls because Plaintiffs did not purchase Alarm.com’s services. Mtn at 23-24. The court in *Aranda* rejected an identical argument, finding that an issue of fact existed even though the named plaintiffs did not purchase anything where the evidence showed the defendants were aware of unlawful telemarketing calls but “continued to accept business flowing” from those calls. *See Aranda*, 179 F. Supp. 3d at 833. And unlike *Hodgin*, 885 F.3d 243, Plaintiffs have proffered evidence that Alarm.com profited from Alliance’s telemarketing.

B. The Ytel dialer that Nationwide used to place calls to cell phones is an ATDS.

The TCPA defines “automatic telephone dialing system” as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” 47 U.S.C. § 227(a)(1). The Ytel Cloud Contact Center that Alliance’s agent Nationwide Alarms used to place calls to cell phones is a predictive dialer. The system provides “several types of automatic telephone dialing software services including predictive dialing, power dialing, progressive dialing and preview dialing services.” Dkt. No. 196-20 at ¶ 42. Ytel’s Master Service Agreement confirms that the system includes “predictive dialing technology.” *Id.*, Ex. C (YTEL 18). Nationwide’s CEO testified that Nationwide used the system in both manual and automatic dialing mode and when calls were placed in “automatic dialing mode,” the system would locate an available call center employee, and then “beep” at that employee signaling that the call should be answered. Ex. 27 at 20:19-22:13. This is a telltale sign of a predictive dialer. Ex. 28 ¶ 9. Calling records show that Nationwide placed 30,812 calls to cell phones in “automatic” mode. *Id.* ¶ 12.

Alarm.com contends that the D.C. Circuit, in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), “vacated the FCC order on which Plaintiffs’ theory of liability relies.” Mtn. at 21:18-20. This characterization overstates the holding *ACA*, in which the D.C. Circuit set aside only the FCC’s 2015 efforts to clarify the equipment that constitutes an ATDS:

In this case, a number of regulated entities seek review of a 2015 order in which the [FCC] sought to clarify various aspects of the TCPA’s general bar against using automated dialing devices to make uninvited calls. The challenges encompass four issues addressed by the agency’s order: (i) which sorts of automated dialing equipment are subject to the TCPA’s restrictions on unconsented calls; ... *** We set aside, however, the [FCC’s] effort to clarify the types of calling equipment that fall within the TCPA’s restrictions.

ACA Int’l, 885 F.3d at 691-92. In explaining the standard against which it issued its opinion, the D.C. Circuit narrowed the reach of its decision to the FCC’s 2015 order:

Under the Administrative Procedure Act, we assess whether the [FCC’s] challenged actions in its 2015 order were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *** Applying these

standards to petitioners' four sets of challenges to the [FCC]s] 2015 Declaratory Ruling, we set aside the [FCC's] explanation of which devices qualify as an ATDS[.]

Id. at 694-95.

In 2003, and again in 2008, the FCC determined that a predictive dialer is an ATDS for purposes of the TCPA. *In the Matter of Rules and Regulations Implementing the TCPA of 1991*, 18 FCC Rcd. 14,014, 14,115 ¶ 165 (2003); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559 (2008). Because the FCC's 2003 and 2008 orders were not appealed under the Hobbs Act and the D.C. Circuit lost jurisdiction to vacate them at the end of the sixty-day timeframe to file such an appeal, *see* 28 U.S.C. § 2344, they bind this court. *See Baird v. Sabre, Inc.*, 636 F. App'x. 715, 716 (9th Cir. 2016).

Since *ACA Int'l*, at least three courts have confirmed that a predictive dialer is an ATDS. *France v. Ditech Fin., LLC*, No. 8:17-cv-03038-SCB-MAP, 2018 WL 1695405, at *8 (M.D. Fla. Apr. 6, 2018) (a predictive dialer makes calls "from a list of numbers fed into the device"); *Reyes v. BCA Fin. Servs., Inc.*, --- F. Supp. 3d ---, 2018 WL 2220417, at *11-12 (S.D. Fla. May 14, 2018) (a predictive dialer remains an ATDS after *ACA Int'l* if it was configured and utilized as such and there was no evidence of human intervention in placing the calls); and *Swaney v. Regions Bank*, No. 2:13-cv-00544-JHE (N.D. Ala. May 22, 2018) (attached as Ex. 33) (the argument that equipment "must have the capacity to store or produce numbers using a random or sequential number generator even if that capacity is never used" cannot be squared with the "continuing validity" of the 2003 FCC Order). *Reyes* rejected the argument that the 2003 and 2008 FCC orders are no longer good law, noting that (1) the D.C. Circuit never overruled them since the time to appeal had long passed; (2) when the D.C. Circuit said the FCC had provided too expansive an interpretation of the TCPA, it was not referring to rulings equating predictive dialers to ATDSs but was "referring to the FCC's interpretation of the TCPA as encompassing devices that have both the present and future capacity to act as ATDSs"; and (3) the D.C. Circuit "did not say that a predictive dialer, or any other type of device, must be able to generate and dial random or sequential numbers to meet the TCPA's definition of an autodialer." 2018 WL

1 2220417, at *11-12. The court noted that the defendant was “essentially urging” the court to
2 adopt an interpretation of ATDS—that a predictive dialer must be able to generate and dial
3 random or sequential numbers to qualify—based on *ACA Int’l* when the D.C. Circuit expressly
4 declined to adopt that interpretation. *Id.* at *12. As in *Reyes*, this Court “cannot deviate” from the
5 prior FCC orders and impose its “own interpretation” of the TCPA. *Id.*

6 Alarm.com relies on two inapposite cases. *Marshall v. CBE Group, Inc.* involved a point-
7 and-click dialing system that required a clicker agent’s intervention to place the calls, and the
8 court noted that the “overwhelming weight of authority” even before *ACA Int’l* found that such
9 systems “do not constitute an ATDS as a matter of law in light of the clicker agent’s human
10 intervention.” No. 2:16-cv-02406-GMN-NJK, 2018 WL 1567852, at *7-8 (D. Nev. March 30,
11 2018)). Nationwide did not use “clicker agents” or “point-and-click” dialing. Nationwide used a
12 predictive dialing system that automatically dialed numbers and then routed connected calls to
13 available agents. The “overwhelming weight of authority” before *ACA Int’l* is that predictive
14 dialers and other systems that dial calls without human intervention are ATDSs. *Meyer v.*
15 *Portfolio Recovery Assoc., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012); *see also Manuel v. NRA*
16 *Grp., LLC*, 200 F. Supp. 3d 495, 501-02 (M.D. Pa. 2016), *aff’d*, 2018 WL 388622 (3d Cir. Jan.
17 12, 2018) (dialers with the capacity to initiate multiple calls prospectively, before agents become
18 available, fall within the ambit of the TCPA); *Fields v. Mobile Messengers Am., Inc.*, No. C 12-
05160 WHA, 2013 WL 6774076, at *3 (N.D. Cal. Dec. 23, 2013) (the inquiry should focus on
whether equipment has the capacity to dial numbers without human intervention).

19 *Dominguez v. Yahoo!* is also inapposite, since it involved a plaintiff who received a text
20 message from the defendant because the previous owner of his cell phone number had signed up
21 to receive text messages. 8 F. Supp. 3d 637, 643 n.6 (E.D. Pa. 2014), *vacated in part*, 629 F.
22 App’x 360 (3d Cir. 2015). Thus, on remand from the Third Circuit, the district court held that the
23 2003 Order did not govern. *See Dominguez v. Yahoo!, Inc.*, No. 13-1887, 2017 WL 390267, at
24 *4 (E.D. Pa. Jan. 27, 2017) (noting that the 2003 Order is “cabined to its holding that the specific

1 type of dialing equipment known as a ‘predictive dialer’ qualifies as an ATDS”).

2 Alarm.com’s proffered statutory interpretation renders swathes of the statute unexplained
3 or meaningless. The statute includes the disjunctive “or,” meaning the definitions of ATDS must
4 include systems, like the Ytel system, that *store* telephone numbers regardless of whether they
5 *produce* numbers. *See In re Dumont*, 581 F.3d 1104, 1111 (9th Cir. 2009) (a statute “ought, upon
6 the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be
7 superfluous, void, or insignificant”). To give meaning to every word, the phrase “using a random
8 or sequential number generator” must modify “produces numbers” because it makes no sense for
9 a device to “store” numbers using a random or sequential number generator. If a device already
has the numbers stored, there would be no need to produce the numbers.

10 If Alarm.com’s interpretation was adopted, it would be impossible for any caller to have
11 a meaningful consent policy. A person could consent to only by sheer coincidence. In addition,
12 the exemption for governmental collection calls would be irrelevant if they were not generally
13 subject to the TCPA. 47 U.S.C. § 227(b)(1)(A)(iii). Entities collecting government debt, or any
14 debt, do not randomly call telephone numbers seeking to collect on an account; they call from a
list of numbers they believe will either contact a debtor or assist in locating the debtor.

15 The only statutory interpretation that gives meaning to every word in the statute and
16 makes sense in the context of the statute as a whole finds that the phrase “random or sequential
17 number generator” modifies the phrase “produce telephone numbers to be dialed.” This
18 interpretation conforms with the FCC’s 2003 and 2008 Orders that a predictive dialer is an
19 ATDS even if it lacks to capacity to randomly or sequentially generate numbers, as well as the
20 Ninth Circuit’s decision in *Meyer*. Alarm.com’s motion for summary judgment of Plaintiffs’ cell
21 phone claim on the ground that the Ytel dialer is not a predictive dialer must be denied. Indeed,
summary judgment should be granted on this issue for Plaintiffs.

22 V. CONCLUSION

23 For these reasons, Alarm.com’s motion should be denied and Plaintiffs’ motion granted.

1 RESPECTFULLY SUBMITTED AND DATED this 22nd day of May, 2018.

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24 PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT; NOTICE OF CROSS-MOTION FOR PARTIAL SUMMARY
JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES - 26

CASE No. 4:15-cv-06314-YGR

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